078A

(8)

No. 06-5754

SUPREME COURT, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VICTOR A. RITA, *Petitioner,*

v

UNITED STATES, *Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* MARC MILLER, MICHAEL O'HEAR, KATE STITH, RONALD WRIGHT, ROBERT FISKE, JAMES RICHMOND, EARL SILBERT, AND PETER VAIRA IN SUPPORT OF PETITIONERS

MARC L. MILLER
Counsel of Record
University of Arizona
James E. Rogers College of Law
1201 E. Speedway Blvd.
Tucson, AZ 85721
520-626-2414

MICHAEL O'HEAR
Marquette University Law School
1103 West Wisconsin Ave.
Milwaukee, WI 53233

ROBERT B. FISKE
Davis, Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

JAMES G. RICHMOND
Greenberg Traurig
77 West Wacker Drive
Chicago, IL 60601

EARL J. SILBERT
DLA Piper
1200 Nineteenth Street, NW
Washington, DC 20036-2412

Additional Attorneys Listed on Inside Cover

KATE STITH
Yale Law School
P.O. Box 208215
New Haven, CT 06520

PETER VAIRA
Vaira & Riley
1600 Market Street
Suite 2650
Philadelphia, PA 19103

RONALD F. WRIGHT
Wake Forest University
School of Law
P.O. Box 7206
Winston-Salem, NC 27109

Counsel for Amicus Curiae

QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Sentencing Reform Act, As Modified By *United States v. Booker*, Does Not Create A Presumption of Reasonableness for Sentences Within The Applicable Guideline Range. 6

II. The Commission Has Not Articulated How It Incorporated the Section 3553(a) Factors. 11

A. The Original Sentencing Commission Did Not Claim that the Initial Sentencing Guidelines Adequately Accounted for the Section 3553(a) Factors 12

B. Guideline Amendments Have Not Adequately or Reasonably Incorporated the Purposes of Sentencing Under Section 3553(a) 16

1. The military service amendment illustrates the inadequate quality of the Commission's explanation and use of sentencing purposes. 18

2. The lack of a criminal history category for true first offenders illustrates the need for a case-by-case assessment of Section 3553(a) Factors..... 23

C. Federal Courts Should Review the Work of the Sentencing Commission Using the Familiar Standards of Review That Apply to Other Administrative Agencies..... 25

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES **PAGES**

Ecology Center, Inc. v. U.S. Forest Service, 451 F.3d 1183 (10th Cir. 2006) 28

Farmer v. State, 777 N.E.2d 1025 (Ind. App. 2002) 21

Mistretta v. United States, 488 U.S. 361 (1989) 13

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 27

State v. Knight, 2006 WL 1491573 (Tenn. Crim. App. 2006) 21

Stout v. State, 834 N.E.2d 707 (Ind. App. 2005) 21

United States v. Alonzo, 435 F.3d, 551 (5th Cir. 2006) 3

United States v. Booker, 543 U.S. 220 (2005) ..... passim

United States v. Cage, 458 F.3d 537 (6th Cir. 2006) 3

United States v. Carty, 453 F.3d 1214 (9th Cir. 2006) 3

United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990) 19

United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) 3, 4

United States v. Cooper ,437 F.3d 324 (3d Cir. 2006) 3

United States v. Davern, 937 F.2d 1041 (1991), rev'd 970 F.2d 1490 (6th Cir. 1992), cert. denied, 507 U.S. 923 (1993) 9

United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006) 3

United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006) 3

United States v. Frank, 864 F.2d 992 (3d Cir.1988) 20

United States v. Green, 436 F.3d 449 (4th Cir. 2006) 2, 3

United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006) 3

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) 3

United States v. Johnson , 445 F.3d 339 (4th Cir. 2006) 3

United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006) 3

United States v. Lincoln , 413 F.3d 716 (8th Cir. 2005) 3

United States v. McCaleb, 908 F.2d 176 (7th Cir.1990) 19

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 3

United States v. Neil, 903 F.2d 564 (8th Cir.1990) 19

United States v. Newsom, 428 F.3d 685 (7th Cir. 2005), cert. denied, 2006 WL 271816 (2006) 3

United States v. North, No. CR. 88-00080- 02, 1989 U.S. Dist. LEXIS 7190 (D.D.C. July 5, 1989) 21

United States v. Pipich, 688 F. Supp. 191 (D. Md. 1988) 18, 19

United States v. Rita, No. 05-0674 (4th Cir. April 27, 2006)(unpublished) 2

United States v. Terrell, 445 F.3d 1261 (10th Cir. 2006) 3

United States v. Williams, 436 F.3d 706 (6th Cir. 2006) 3

United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005) 4

STATUTES, RULES, AND REGULATIONS

5 U.S.C. § 553 ..... 26, 27

5 U.S.C. § 706(2)(A) 27

56 Fed. Reg. 779-80 (1991) 18

18 U.S.C. § 3553(a) ..... passim

18 U.S.C. § 3553(a)(1) ..... passim

18 U.S.C. § 3553(a)(2) ..... passim

18 U.S.C. § 3553(a)(3) 2, 29

18 U.S.C. § 3553(a)(6) 2, 25, 29

18 U.S.C. § 3553(b) ..... passim

28 U.S.C. § 991(b)(1)(C) 27

28 U.S.C. § 991(b)(2) 26

28 U.S.C. § 994(j) 24

28 U.S.C. § 994(p) 21, 26

28 U.S.C. § 994(x) 25

28 U.S.C. § 995(a)(8)-(9),(12) – (19) 26

MISCELLANEOUS

1989 U.S.S.G., app. C, amend. 99 17

1990 U.S.S.G., app. C, amend. 330 17

U.S.S.G. § 4A1.3(b)(2) 24

U.S.S.G., app. C, amend. 500, amend. 518 18

A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (Jan. 4, 2005), www.ussc.gov 23, 24

Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988) 12

Paul Hofer & Mark Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19 (2003) 14

Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (May 2004), www.ussc.gov 23

Marc Miller, Purposes At Sentencing, 66 So. Cal. L. Rev. 413 (1992) 13, 14, 17

Marc Miller & Ronald Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev. 723 (1999) 12, 16, 22

Michael Edmund O'Neill, Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System, 42 B.C. L. Rev. 291 (2001) 24

Michael Edmund O'Neill, Linda Drazga Maxfield & Miles Harer, Past as Prologue: Reconciling Recidivism and Culpability, 73 Fordham L. Rev. 245 (2004) 24

Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?, 27 Am. Crim. L. Rev. 289, 318-320 (1989) 17

Richard J. Pierce, Jr., Sidney A. Shapiro, & Paul R. Verkuil, Administrative Law and Process § 7.5 (4th ed. 2004) 28

Aaron Rappaport, Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines. 52 Emory L.J. 557 (2003) 14

Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998). 12

U.S. Sentencing Commission, Annual Report, Table 21 (2005) 23

United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at http://www.ussc.gov/Blakely/bookertestimony.pdf 5

United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 79-180, 142-153 (2004) 5

Robert Weisberg & Marc Miller, Sentencing Lessons, 58 Stan. L. Rev. 1 (2005) 29

William W. Wilkins, Jr., The Federal Sentencing Guidelines: Striking an Appropriate Balance, 25 U.C. Davis L. Rev. 571 (1992) 12

William Wilkins & John Steer, The Role of Sentencing Guideline Amendments in Reducing Sentencing Disparity, 50 Wash & Lee L. Rev. 63, 84 n. 107 (1993) 21

Harlington Wood, Sentencing Symposium: Panel Remarks, 44 St. Louis U. L.J. 418 (2000) 22

Ronald F. Wright, Sentencers, Bureaucrats, and the Adminis trative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1 (1991)..... 26

David Yellen, Reforming the Federal Guidelines' Misguided Approach to Real Offense Sentencing, 58 Stan. L. Rev. 267 (2005) 15

INTEREST OF AMICUS CURIAE[1]

Amicus curiae are several law professors with extensive scholarly and practical experience with the federal sentencing guidelines and several former United States attorneys with experience as prosecutors and now in private practice with the federal sentencing system. This brief is submitted with the permission of the parties.

Marc Miller is the Ralph W. Bilby Professor at the James E. Rogers University of Arizona College of Law. He was the founding editor, with Daniel Freed, of the Federal Sentencing Reporter (University of California Press / Vera Institute of Justice). He is the co-editor of the leading casebook on the law of sentencing. Nora Demleitner, Douglas Berman, Marc Miller & Ronald Wright, Sentencing Law and Policy: Cases, Statutes and Executive Materials (Aspen Publishers 2003). Miller has written extensively on the federal sentencing system. Prior to joining the academy he served as an Attorney-Advisor in the Office of Legal Counsel of the United States Department of Justice.

Michael O'Hear is Associate Professor of Law at Marquette University Law School, where he teaches Criminal Law, Criminal Procedure, and Sentencing. He is an Editor of the Federal Sentencing Reporter and has published numerous articles on federal sentencing in leading law reviews.

Kate Stith is the Lafayette S. Foster Professor of Law at Yale Law School. She teaches and writes in the areas of sentencing, criminal law, criminal procedure, and constitutional law. Prior to joining the faculty at Yale, Professor Stith was an Assistant United States Attorney for the Southern District of New York, where she prosecuted

---

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

white-collar and organized-crime cases. Her book on the federal sentencing guidelines, *Fear of Judging* (with J.A. Cabranes), was awarded a Certificate of Merit by the ABA in 1999.

Ronald Wright is Professor of Law at Wake Forest University School of Law. Wright has written extensively on the federal and North Carolina state sentencing systems. Prior to joining the academy he served as a Trial Attorney with the United States Department of Justice, prosecuting white-collar criminal cases.

They are joined by four attorneys who formerly served as United States Attorneys and in other capacities within the U.S. Department of Justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Rita*, No. 05-0674 (4th Cir. April 27, 2006) (unpublished), the United States Court of Appeals for the Fourth Circuit affirmed Victor Rita's thirty-three month within-guideline sentence for perjury. Neither the trial court nor the appellate panel discussed the relevance of any of the factors that the Sentencing Reform Act ("SRA") demands that courts "shall consider" in every case, including the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. § 3553(a)(1), the various purposes of sentencing, 18 U.S.C. § 3553(a)(2), the kinds of sentences available, 18 U.S.C. § 3553(a)(3), or the goal of avoiding unwarranted sentence disparities for similar offenders and offenses, 18 U.S.C. § 3553(a)(6).

Victor Rita was a 57-year-old decorated veteran of two wars. Rita has severe health problems, including diabetes and multiple effects from exposure to Agent Orange in Vietnam. In affirming Rita's sentence the appellate panel noted:

> Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)

(citing United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005), cert. denied, 2006 WL 271816 (2006)).

Seven circuits provide a presumption of reasonableness to a sentence imposed within a guideline range after *United States v. Booker*, 543 U.S. 220 (2005). *See United States v. Alonzo*, 435 F.3d, 551 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). In *Mykytiuk*, the Seventh Circuit wrote that "the guidelines reflect 'eighteen years' worth of careful consideration of the proper sentence for federal offenses,' and the need for 'uniformity.'" 415 F.3d at 607-608.

Four courts of appeals initially adopted a presumption of reasonableness with no reason at all, *see United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Lincoln* , 413 F.3d 716 (8th Cir. 2005). Courts in each circuit later justified the presumption with the assertion that the guidelines already incorporate the sentencing purposes and factors set forth in 18 U.S.C. § 3553(a). *See United States v. Cage*, 458 F.3d 537, 542-43 (6th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson* , 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). The D.C. Circuit has not given any reason for adopting the presumption, other than that its "sister circuits" had done so. *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

Five circuits have rejected a presumption that a sentence within the applicable guideline range is reasonable, and instead demand judicial consideration of the factors listed in section 3553(a). *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006); *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Cooper* , 437 F.3d 324, 331-32 (3d Cir. 2006).

The idea that the guidelines should receive substantial deference despite this Court's remedial opinion in *Booker* was first articulated in a rapidly circulated and widely discussed decision from the Honorable Paul J. Cassell in the District of Utah. Judge Cassell's long opinion began: "Yesterday the Supreme Court handed down its decision in *United States v. Booker*...." *United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005). The Court allowed briefing and argument on the question of the relevance of *Booker* to Wilson's sentence—such briefing and argument to be made in the spirit of the Red Queen, following issuance of the opinion. *Id.* at 961 ("The court is ... reluctant to delay the sentencing in this matter to ponder over the meaning of *Booker*. ... At the same time, however, the court realizes that its opinion may touch on subjects about *Booker* that the parties wish to brief. Accordingly, the court will hold the judgment in this matter in abeyance for ten days to give either side an opportunity to file any objection to any of the conclusions in this opinion."); *cf.* Lewis Carroll, Alice in Wonderland, Chapter 5 (orig. pub. 1865) ("there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.").

The idea that a sentence within the applicable guideline range is presumptively reasonable after *Booker* has been justified by assertion, and assertion alone. *See, e.g.*, *Wilson*, 350 F. Supp.2d at 915 ("Over the last 16 years, the Sentencing Commission has promulgated and honed the Guidelines to achieve these congressional purposes...."); *Claiborne*, 439 F.3d at 481 ("The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable."). Nothing in the Sentencing Reform Act after the excision of section 3553(b) by this Court in *Booker* creates such a presumption, nor does the language of *Booker* itself. No case actually looked at what the United States Sentencing Commission had in fact done or

said in justification of particular guidelines and applicable amendments, and in particular with regard to section 3553(a) factors. These cases interpreting section 3553(a) after *Booker*—like many cases interpreting departures under section 3553(b) before *Booker*—instead simply assert in some cases and assume in others that the United States Sentencing Commission *must have* already considered and incorporated the factors Congress directed judges to consider in section 3553(a).

Any assumption that the United States Sentencing Commission *must have* considered section 3553(a) factors is contrary to law and fact. It is contrary to the requirements of the SRA. It is contrary to this Court's remedial opinion in *United States v. Booker*. And it is contrary to fundamental principles of administrative law.

Any assumption that the United States Sentencing Commission considered section 3553(a) factors is also contrary to the thin administrative record the United Sentencing Commission produced for most of its 696 amendments. Assertion to the contrary by the United States Sentencing Commission after the fact, or similar *ex post* assertions by the United States Department of Justice, does not make it so. *Compare* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 79-180, 142-153 (2004) (making no general claim that guidelines incorporated section 3553(a) factors, an after-the-fact assertion that the Commission prioritized "proportionate punishment"—language not used in section 3553(a)(2)) *with* Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at http://www.ussc.gov/Blakely/bookertestimony.pdf (last visited December 14, 2006) ("[T]he factors the Sentencing Commission has been required to consider in developing the

Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision."). To the contrary, *ex post* assertions by the Commission, the Department of Justice and by appellate courts that section 3553(a) factors have been considered highlights the absence of contemporaneous explanation for most amendments and guidelines.

ARGUMENT

I. The Sentencing Reform Act, As Modified By *United States v. Booker*, Does Not Create A Presumption of Reasonableness for Sentences Within The Applicable Guideline Range.

Before this Court's decision in *Booker*, the Sentencing Reform Act provided two critical procedural directions to sentencing judges. First, judges were directed in 18 U.S.C. § 3553(a) to consider seven factors in every case, including—as the fourth listed factor—the applicable sentencing guidelines:

> **§ 3553. Imposition of a sentence**
>
> **(a) Factors to be considered in imposing a sentence.**
>
> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. *The court, in determining the particular sentence to be imposed, shall consider:*
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for:

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code , subject to any amendments made to such guidelines by act of Congress....

(5) any pertinent policy statement—...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(emphasis added). Second, 18 U.S.C. § 3553(b) told judges when the guideline sentence and range "referred to in subsection (a)(4)" should be applied, and when departures from the guideline sentence and range would be appropriate.

> **(b) Application of guidelines in imposing a sentence.**
>
> **(1) In general.**—...[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2)....

While Congress directed the United States Sentencing Commission to consider the purposes of sentencing listed in section 3553(a)(2), on its face the Sentencing Reform Act (SRA) sharply delineates the different institutional obligations of the Commission and courts. The obligations of judges are far more focused on the facts and circumstances of individual cases, and the statute invites judges in each case to test and, when appropriate, depart from the guidelines.

Until this Court resurrected section 3553(a) in *Booker*, however, there is little evidence that the federal courts or the United States Sentencing Commission were aware that section 3553(a) existed, and compelling evidence that no court or institution read section 3553(a) on its face: as a directive to sentencing judges to guide their analysis in every case ("[t]he court ... shall consider"), including the parsimony requirement that judges "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

The only appellate decision to explicitly affirm a trial court's sentence based on consideration of section 3553(a) factors was reversed by that same circuit, sitting en banc. *United States v. Davern*, 937 F.2d 1041 (1991), *rev'd* 970 F.2d 1490 (6th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993).

Instead, federal courts before *Booker* treated section 3553(a) as a background directive *addressed by Congress to the Sentencing Commission*, and treated section 3553(b) as the only operative statutory provision in determining a sentence or reviewing a sentence on appeal.

The remedial portion in *Booker* has made a knee-jerk recitation of section 3553(b) an impossible end point in guideline sentencing decisions; for the first time, this Court focused the attention of the entire federal sentencing system and advocates on the text and meaning of section 3553(a).

Or so this Court might have thought. However, a sufficiently strong presumption of reasonableness attached to any guideline range or guideline calculation simply recreates in new guise the old reading of section 3553(b) as the be all and end all of federal sentencing. Effectively eliminating section 3553(a) before *Booker* was an inadequate reading of clear statutory text; it is all the more inadequate in the face of *Booker*, which resurrected section 3553(a) as the operating instructions for calculating and explaining sentences, and which removed the more presumptive aspects of section 3553(b) as the plausible excuse for ignoring 3553(a) in the past. Any interpretation of section 3553(a) which accords too heavy a weight to any of the factors—including the applicable guideline sentence—runs up against the plain terms of section 3553(a) which state that a judge shall consider all seven factors in every case, including the offender and offense characteristics and the appropriate purposes of punishment.

The *Booker* remedial opinion "severed and excised" section 3553(b)(1), 543 U.S. 220, 245 (2005), and altered the standard of appellate review to de-link the previously man-

datory application of the guidelines and prior *de novo* appellate review of the correctness of each guideline application. The Court emphasized that sentencing courts must still "consider" the guideline range as part of the multi-part section 3553(a) calculus. *Id.* at 245, 259, 264 (citing section 3553(a)(4)).

Any standard of guideline application or review which so privileges guideline ranges and calculations over the other relevant facts in each case—which makes the fourth step of section 3553(a) the first step and presumptively sufficient on its own—recreates the binding effect of now-excised section 3553(b).

The appellate standard of reasonableness for review of all sentences after *Booker* reinforces this straightforward reading: that the guidelines must be considered under section 3553(a)(4), but that consideration of the guidelines alone is never sufficient. "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." 543 U.S. at 765-766.

Treating within-guideline sentences or any specific guideline calculation or policy statement as presumptively reasonable effectively writes out of the statute the remaining factors of section 3553(a), which judges must consider as well. Asserting that the United States Sentencing Commission incorporated the other section 3553(a) factors in its guidelines simply recreates section 3553(b)—making the guideline sentence presumptively correct (reasonable) "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Judicial factfinding in such a system, this Court held in *Booker*, violates the Sixth Amendment.

II. The Commission Has Not Articulated How It Incorporated the Section 3553(a) Factors.

Congress created the United States Sentencing Commission to develop guidelines for federal judges in sentencing criminal offenders. Such rule-making is akin to the work of other federal administrative agencies. Administrative rules deserve deference from the federal courts only when the agency sets forth the relevant facts on the administrative record and articulates a rational connection between the available facts and the policies that the agency has chosen.

When it issued the original sentencing guidelines, the Sentencing Commission partially complied with the ordinary task of an administrative agency to justify its choices. Given the limited time available to the Commission and the commitment of the original Commissioners to begin an evolutionary process that would provide a firmer basis for the guidelines over time, this initial agency action was reasonable.

During its work over the next two decades, however, the Commission never fulfilled the promise to articulate an adequate factual basis for the original Guidelines or for the many amendments that followed. It never developed the habit of justifying its amendments by explaining – rather than merely asserting – the connection between those policy choices and the statutory purposes of sentences.

No other administrative agency receives a presumption of reasonableness for its rule-making or adjudication based merely on the fact that the agency has existed for a long time, or based on the agency's bare assertion that its choices are reasonable. In the absence of an adequate explanation for its original guidelines or its significant amendments, courts should not grant a presumption of reasonableness to the Commission's work.

A. The Original Sentencing Commission Did Not Claim that the Initial Sentencing Guidelines Adequately Accounted for the Section 3553(a) Factors.

The original members of the Sentencing Commission stated that their initial sentencing guidelines, drafted in 1987, were based on the past practices of federal sentencing judges. The Commission's 1987 Supplemental Report on the drafting of the Guidelines described the database of federal sentences that the Commission assembled. It compiled certain data about the characteristics of the offenses and the offenders in those cases. According to (then) Judge and Commissioner Breyer, the Commission then selected the "categories" of guideline factors in light of those past cases, hoping to make guideline sentences turn on some of the same case features that commonly influenced sentences before the guidelines. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988). Commissioner (and Judge) William Wilkins offered a similar account that stressed reliance on past judicial practice. William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571 (1992) ("The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that grounds itself in existing sentencing practices.").

It is not possible, from the face of the administrative record, *see* 18 U.S.C. § 3553(b), or from other statements of the Commission, to determine exactly how the data on past practices translated into many of the features of the initial guidelines. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998). The Commission appears to have col-

lected no data on many factors that appeared in the initial guidelines. The Commission's explanation for many key features of the guidelines was summary in style and did not reveal any of the knowledge-based reform Congress demanded in the SRA.

The past practices that purportedly formed the basis for the guidelines are not the same as the sentencing purposes of section 3553(a), and the administrative record for the Commission's original guidelines do not elaborate on how past judicial practices serve any particular statutory purpose, or any designated combination of purposes. None of the accounts from the Commission itself or from individual Commissioners make any claim that the original guidelines adequately determined the proper operation of the purposes of sentencing, listed in section 3553(a)(2), for all federal sentences or for any subgroups of offenses or offenders. *See* Marc Miller, *Purposes At Sentencing*, 66 So. Cal. L. Rev. 413 (1992). The Introduction to the Guidelines, which explained the Commission's initial policy choices and the rough empirical foundations of the original guidelines, has never referred to section 3553(a), either in its original or evolved form. Nor have the "Application Instructions" directed judges to consider section 3553(a) factors. U.S.S.G. §1B1.1.

Even if "past practice" somehow did incorporate some of the section 3553(a) factors properly on average across the entire collection of cases that the Commission studied—a claim for which we think there is no basis in the record or in fact—it does not necessarily capture any judgment about the proper mix of purposes for any categories of offenses or offenders, or for particular cases.

It is not clear how the Commission *could* account for all section 3553(a) factors; the Commission is given directly authority over a different list of factors. The only one of the section 3553(a) factors that the Commission is directed to consider throughout the SRA are the purposes of sentencing listed in section 3553(a)(2). But such consideration of pur-

poses by the Commission does not supplant consideration of the applicable purposes by judges in the light of the offender and offense facts and available sentences in each case, and to "impose" a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes.

> Congress made the purposes of sentencing the foundation for the development of the first comprehensive federal sentencing system. The Act mentions the purposes of sentencing eighteen times. Some of those references refer to the work of the Commission in crafting guidelines. Congress instructed the Sentencing Commission "to establish sentencing policies and practices" that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." Congress specified the achievement of the listed statutory purposes as the Commission's first duty in formulating the guidelines.

Marc Miller, *Purposes at Sentencing*, supra at 417 (footnotes omitted).

Evidence that the Commission has not adequately or reasonably explained the role of purposes in the guidelines comes from the effort in two scholarly articles to "rationally reconstruct" the Commission's purposes by looking at the Guidelines. The scholars came to dramatically different conclusions, even though they started with the same guidelines and accompanying explanations. *Compare* Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*. 52 Emory L.J. 557 (2003) *with* Paul Hofer & Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19 (2003).

Even if the original Commission had considered the section 3553(a) factors in relation to all the conduct it decided was relevant to sentencing, that assessment would be suspect after *Blakely* and *Booker*, and counsel against any presumption of reasonableness for guidelines built on this foundation. The Introduction to the Guidelines Manual heralded the ac-

complishment of the Guidelines in setting punishment on the basis of "relevant" conduct beyond the offense of conviction. But *Blakely* and *Booker* teach that there is a constitutional distinction between convicted conduct and other crimes that were not charged or proved to a jury beyond a reasonable doubt. *See* David Yellen, *Reforming the Federal Guidelines' Misguided Approach to Real Offense Sentencing*, 58 Stan. L. Rev. 267 (2005) (emphasizing the extreme position of the federal guidelines relevant conduct compared to state guideline systems in the light of *Booker*). Reading section 3553(a) in light of *Blakely* and *Booker* undermines the original Commission's choice to treat non-offense conduct as the equivalent of offense conduct; the relevant conduct rules ignore the significance of the word "offense" in section 3553(a). Hence even if the Guidelines, largely written before *Blakely* and *Booker*, sought to incorporate section 3553(a) factors, they do not do so because of a fundamental constitutional misunderstanding prior to *Blakely* and *Booker*. Specifically, the Guidelines provide for over-punishment in cases where there is significant aggravating non-offense-of-conviction conduct.

Every observer should acknowledge that the original Commission faced an overwhelming drafting challenge within a short time frame. It is little wonder that the Commission could not, under those circumstances, consider the proper operation of various sentencing purposes for different categories of offenses and offenders. It would have been impossible, in that setting, to place on the administrative record the sort of factual support that would normally be needed to sustain on judicial review an administrative policy choice.

The Commission's original reliance on "past practices," therefore, was coupled with a declaration that the Guidelines would evolve. The factual record and explanation on the record that would ultimately be necessary to sustain the Guidelines could be assembled over time.

Tragically, the Sentencing Commission never delivered on its initial promise to strengthen the connections between

its guidelines and the purposes and empirical research that the statute required for a foundation. Instead of evolution, the Commission gave us *ipse dixit*. The abandonment of the ideal of evolving and well-supported guidelines is reflected in changes over time to the language of the Introduction to the Guidelines. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999) (documenting the shifting language). The failure to deliver on the promise of an evolving and increasingly well-supported set of Guidelines appears not only in the shifting language of the Introduction, but also in the pattern of guideline amendments over the years.

B. Guideline Amendments Have Not Adequately or Reasonably Incorporated the Purposes of Sentencing Under Section 3553(a).

The Sentencing Commission has issued 696 amendments to the guidelines. The Commission has not, however, carried out the original plan to provide adequate factual basis and explanation for the guidelines. In particular, the Commission has not linked its amendments to a discussion, rather than a passing invocation, of the statutory purposes of sentencing. The limited data that the original Commission had available to it made it impossible to employ an empirical basis for assigning weights to many sentencing factors in the original Guidelines. Even more significantly, there is no indication that in subsequent amendments the Commission employed *any* empirical basis for assigning weights to many factors it identified in such amendments.

On occasion the Commission's announcement of the amendment includes a passing reference to one of the classic purposes. For example, in 1989, when it increased the offense level corresponding to the amount of loss from theft and fraud, the Commission noted that the reason for the

amendment was "to provide additional deterrence and better reflect the seriousness of the conduct." 1989 U.S.S.G., app. C, amend. 99. A detailed 1990 amendment that substantially increased the sentencing range for arson included the following explanation, which in its entirety reads:

> This amendment restructures this guideline to provide more appropriate offense levels for the conduct covered. The Commission has determined that the offense levels provided in the current guideline do not adequately reflect the seriousness of the offenses that are covered under this section. The effective date of this amendment is November 1, 1990.

1990 U.S.S.G., app. C, amend. 330.

Because the references to "additional deterrence" and to the need to reflect the seriousness of the offense are unsupported by evidence or explanation of how the existing guideline failed to adequately deter or reflect the seriousness of the behavior, it is impossible for a court to judge the adequacy or reasonableness of the Commission's consideration of sentencing purposes. Criticism of the lack of explanation for amendments and the lack of connection to the purposes of sentencing is longstanding. *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-320 (1989) (criticizing amendment 116 for "gratuitously" increasing fraud penalties based on "overtly political" and "inexpert" grounds without a foundation in data and without conducting statutorily required assessments); Marc Miller, *Purposes At Sentencing*, 66 So. Cal. L. Rev. 413, 443-448 (1992) (citing the absence of discussion or evidence of purposes of punishment in guideline amendments). The radical failure of explanation in guideline amendments reveals an agency that might be described not as a "junior varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting), but a "junior varsity administrative agency."

The failure of explanation is perhaps most obvious in those instances where the Commission intended to resolve splits in the circuits—splits that are only occasionally identified in amendments. *See, e.g.*, U.S. Sentencing Guidelines Manual Appendix C, Amendment 500; *id.*, Amendment 518. In such instances the Commission's goal presumably would be to maintain reasonable conformity in law. But such a goal does not make the minimal demands of explanation any less significant. In such instances, the Commission's reasons for choosing one side in the split over the other side look more like a Roman emperor at the coliseum issuing a thumbs down than like the reasoned appellate judicial review that such a decision might replace. The failure of explanation, in sharp contrast to the opinions of this Court, might lead the Commission to be called a junior varsity Supreme Court.

These unadorned invocations of sentencing purposes would not provide the sort of reasoned decision-making that the SRA expected of the Commission. The conclusory mention of a purpose from any other administrative agency would not satisfy its obligations to provide an adequate factual basis and to demonstrate the connection between the facts and the policy chosen; neither should it suffice for the Sentencing Commission.

1. The military service amendment illustrates the inadequate quality of the Commission's explanation and use of sentencing purposes.

Particularly relevant to the sentence in Victor Rita's case was the 1991 amendment that made a defendant's past military service "not ordinarily relevant" to the sentence. See 56 Fed. Reg. 779-80, amend. 24 (1991). During the first four years of sentencing under the guidelines, several federal courts decided that a defendant's prior military service constituted an appropriate basis for a downward departure from the guideline sentence. For instance, in *United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988), the defendant

was charged with theft of mail matter by a postal employee. The presentence investigation report revealed that the defendant served for four years in the United States Marine Corps. During his year of combat in Vietnam, he earned over 45 awards of the Air Medal, including one special award for heroism. The Probation Office considered this military service "to be simply a form of employment history," and gave it no weight in the sentencing calculus. The court, however, noted the "lack of any discussion of military history" in the administrative record of the Sentencing Commission and explained why a person's military record should be relevant at sentencing:

> An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.

After "considering all the factors set forth in 18 U.S.C. § 3553(a)," the court departed from the guidelines and sentenced Pipich to probation. *See also United States v. McCaleb*, 908 F.2d 176, 179 (7th Cir.1990) (defendant's military record might, under some circumstances, warrant a downward departure; district court's refusal to make such a departure was unreviewable); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir.1990) (military service may warrant a downward departure "in an unusual case," but downward departure was not justified because defendant served only as a recruiter).

On the other hand, some courts refused to consider military service as a departure ground. In *United States v. Chiarelli*, 898 F.2d 373 (3d Cir. 1990), the defendant

enlisted in the United States Marine Corps in 1961 and was honorably discharged after four years of service. He spent approximately eighteen months in Okinawa and was a lance corporal at the time of his discharge. The sentencing judge refused to consider his past military service as a potential ground for a downward departure, and the Third Circuit upheld this decision. Chiarelli's argument, the court said, "posits a substantive due process right to individualized treatment in sentencing. This argument has no vitality after our decision in *United States v. Frank*, 864 F.2d 992, 1009 (3d Cir.1988)."

The Sentencing Commission entered the field in 1991 and amended its policy statements to make a defendant's past military service "not ordinarily relevant" to the guideline sentence or the departure decision. The explanation for Amendment 386 follows:

> Reason for Amendment: This amendment expresses the Commission's intent that the factors set forth in this part are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range; but that, unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range. The language within these sections is revised for clarity and consistency. In addition, this amendment adds language that expressly states that the guidelines do not apply to defendants sentenced as juvenile delinquents; and sets forth the Commission's position that physical appearance, including physique, military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

The Chair and General Counsel of the Commission later explained that the restriction in Amendment 386 of consideration of military service and a variety of other offender

characteristics was intended to promote uniformity in sentences.

> [The] continued litigation involving these issues influenced the Commission to issue this new policy statement. The subsequent apparent decrease in appellate cases involving a departure for these reasons suggests that the policy statement effectively communicated Commission intent that departures based on offender "good citizen" characteristics rarely would be appropriate.

William Wilkins & John Steer, *The Role of Sentencing Guideline Amendments in Reducing Sentencing Disparity*, 50 Wash & Lee L. Rev. 63, 84 n. 107 (1993).

Neither the contemporaneous explanation by the Commission, as required by 28 U.S.C. § 994(p), nor the *ex post* justification by the then Commission Chair and General Counsel, pass a minimal threshold of justification that should satisfy appellate courts reviewing either the reasonableness of the rule or the relevance of such factors in future cases. There is an almost total absence of both empirical and jurisprudential justification behind Amendment 386.

Military service has long been recognized in many systems, including the federal system before the implementation of guidelines, as relevant to sentencing in some cases. *See e.g., United States v. North*, No. CR. 88-00080- 02, 1989 U.S. Dist. LEXIS 7190 (D.D.C. July 5, 1989). Courts in several states have found military service to be a relevant sentencing factor. *See, e.g., State v. Knight*, 2006 WL 1491573 (Tenn. Crim. App. 2006); *Stout v. State*, 834 N.E.2d 707 (Ind. App. 2005); *Farmer v. State*, 777 N.E.2d 1025 (Ind. App. 2002). Judge Harlington Wood of the United States Court of Appeals for the Seventh Circuit (and before that of the Southern District of Illinois) observed, in reflecting on the guidelines:

> I cannot see myself giving a defendant who had been awarded the Medal of Honor the same sentence I might give to another defendant in a similar situation. Under

> the Guidelines, the Medal of Honor recipient would have to be sentenced, as I see it now, the same as someone who had not served his country at all.

Harlington Wood, *Sentencing Symposium: Panel Remarks*, 44 St. Louis U. L.J. 418 (2000). It is not surprising that sentencing judges would consider military service relevant for some offenders. As discussed in the Brief Amici Curiae of the National Veterans Legal Services Program and the Veterans for America, military service traditionally carries more moral weight than other prior employment, and military service is often intertwined with various physical and mental illnesses that disproportionately affect veterans.

The limitation on consideration of military service at sentencing was not grounded in any reason or justification worthy of judicial respect. The sad irony for this guideline is that it deals with a claim to recognition for the most basic contribution of citizens to their country, and therefore a claim to respect. Victor Rita, like others who have served had the legal right to have "the history and characteristics of the defendant" considered by the sentencing court. 18 U.S.C. § 3553(a)(1). Like those who serve our country now in Iraq and Afghanistan, but later go astray, sometimes that good service should matter; sometimes the scale ought to weigh elements of an offender's life beyond the bad acts.

Before the Guidelines, offender characteristics such as military service, gender, intoxication, drug addiction, employment and economic status, family situation, and the like had a substantial impact on sentences. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 n. 76 (1999). Perhaps guidelines could be written that would reasonably justify a limitation on the consideration of this factor, but the current Sentencing Guidelines do not.

A presumption of reasonableness to a within-guidelines sentence after *Booker* would create respect for rules where

none has been earned. The path towards sound consideration of the relevant factors in each case is to require judges to follow the terms of each part of section 3553(a), and to reject any presumption of reasonableness for within-guideline sentences.

2. The lack of a criminal history category for true first offenders illustrates the need for a case-by-case assessment of Section 3553(a) Factors.

Many offender characteristics have received only passing attention in the guidelines, policy statements, and explanations for guideline amendments. On the other hand, the Commission has offered a more detailed explanation for its treatment of one offender characteristic: the defendant's prior criminal record. This factor is built into the very structure of the guidelines grid. It has been the subject of discussion in Commission reports and in the explanations for some guideline amendments. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), www.ussc.gov/publicat/Recidivism_General.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf. Even for this centrally-important offender characteristic, however, the connection between the sentencing factor and the purposes of sentencing in section 3553(a) is absent in at least some cases.

A substantial number of offenders with no prior convictions are imprisoned in federal correctional facilities. The group of offenders who have zero criminal history points is a dramatic portion of all federal offenders: in 2005 the Commission reported that 45.4 % of all offenders had zero criminal history points. U.S. Sentencing Commission, Annual Report, Table 21 (2005). These true first-time offenders are treated comparably at sentencing to other offenders who

have a limited criminal history, including some who were convicted of violent felonies.

As demonstrated in the research of former Commissioner Michael O'Neill, and in Commission reports, true first offenders present very different risks of recidivism from the other defendants within Criminal History Category I. Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291 (2001); Michael Edmund O'Neill, Linda Drazga Maxfield & Miles Harer, *Past as Prologue: Reconciling Recidivism and Culpability*, 73 Fordham L. Rev. 245 (2004). The Commission has found that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism. *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 15 (Jan. 4, 2005). Commission reports have concluded that first offenders are more likely to be involved in less dangerous offenses and that their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role, or acceptance of responsibility. They are also more likely than offenders with criminal histories to have a high school education, to be employed, and to have dependents. *Recidivism and the First Offender* (May 2004), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

Despite the compelling evidence of the incomplete nature of the original criminal history score, the Commission still prohibits a departure below the applicable range for Criminal History Category I. *See* U.S.S.G. § 4A1.3(b)(2). A sentencing court considering the section 3553(a) factors when faced with a first offender such as Mario Claiborne, the petitioner in the companion case, No. 06-5618, might reasonably decide to treat the first offender differently from other defendants whose prior records keep them within Category I.

A court assessing the reasonableness of this guideline should also consider the directive from Congress to the Commission in the Sentencing Reform Act to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

Far from demonstrating the presumptive reasonableness of the guidelines or the applicable guideline range, the multiple dimensions on which this guideline has been found wanting—ignoring statutory commands, empirically empty, theoretically incomplete, practically gross—should lead if anything to a presumption that offender characteristics as a class have not been "adequately considered" or "reasonably justified." In the absence of grounded or coherent guidelines across offender characteristics, the statute leaves for judges, following the commands of §§ 3553(a)(1), 3553(a)(2), and 3553(a)(6), to determine through common-law reasoning and deferential reasonableness review the role that such factors should play.

C. Federal Courts Should Review the Work of the Sentencing Commission Using the Familiar Standards of Review That Apply to Other Administrative Agencies.

The provisions of the SRA only apply certain portions of the Administrative Procedure Act (APA) to the work of the United States Sentencing Commission. The SRA, at 28 U.S.C. § 994(x), applies the publication requirements of the APA rulemaking process to the Sentencing Commission, but it does not apply the judicial review provisions of the APA to the Commission.

Nevertheless, Congress assigned to the federal courts a review function similar to that applied under the judicial review provisions of the APA in the original SRA departure

standard, 18 U.S.C. § 3553(b). Section 3553(b) instructs the courts to determine whether the Commission "adequately" considered factors during the creation of the guidelines. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal. L. Rev. 1 (1991).

The parallels to the factual basis required of administrative agencies under the APA are reinforced by multiple provisions of the SRA that emphasize the role of empirical evidence in the Sentencing Commission's work. The SRA charges the Commission with developing means of measuring the effectiveness of sentencing practices, 28 U.S.C. § 991(b)(2), and grants the Commission various information-gathering powers, research mandates, and educational functions. See 28 U.S.C. § 995(a)(8)-(9), (12)-(19).

More evidence that Congress expected the Sentencing Commission to place its justifications for sentencing guidelines on the record for review appears in 28 U.S.C. § 994(p). That provision states that proposed amendments to sentencing guidelines "shall be accompanied by a statement of the reasons therefor." This language functions in much the same way as the APA requirement for informal rulemaking that the agency provide a "concise general statement of basis and purpose." 5 U.S.C. § 553.

The Sentencing Reform Act also defines the "administrative record" available to the court when determining whether the Commission gave "adequate" consideration to a factor. A 1987 amendment to the statute instructs courts, when considering whether the Commission has adequately foreclosed a ground for departure, to consider only three sources: (1) the guidelines themselves, (2) policy statements, and (3) official commentary. *See* 18 U.S.C. § 3553(b). The Commission's reasons for adopting or amending a guideline must appear on the face of this administrative record; as a corollary, any assertion of reasons appearing elsewhere may not be considered by courts in assessing whether the Commission adequately considered a particular factor.

Congress' desire that data and knowledge drive sentencing reform places an even higher burden on the Commission in justifying its rules and amendments. See 28 U.S.C. § 991(b)(1)(C) (guidelines to be drafted and revised based on "advancement in knowledge of human behavior as it relates to the criminal justice process").

Federal courts normally defer to the decisions of federal administrative agencies if those agencies provide an adequate explanation for their choices. When an administrative agency creates rules under the notice-and-comment process of 5 U.S.C. § 553, the APA instructs federal courts to uphold the validity of those rules so long as they are not "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

The federal courts have elaborated on what administrative agencies must do to demonstrate that their rules are not arbitrary and capricious. Above all else, the agencies must articulate the connection between the facts available to the agency and the policy chosen. In *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), this Court invalidated a rule of the National Highway Traffic Safety Administration that revised the requirements for the installation of air bags on automobiles, noting that, when an agency adopts a regulation altering its "former views as to the proper course," it must "supply a reasoned analysis for the change." The *State Farm* opinion offered this general observation about the obligations of an administrative agency to support its policy choices:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

See also Richard J. Pierce, Jr., Sidney A. Shapiro, & Paul R. Verkuil, Administrative Law and Process § 7.5 (4th ed. 2004) ("Typically, the agency's findings and conclusions must be linked to the action it takes through a chain of reasoning. [The] agency must state its reasons in support of its action, and those reasons are subject to judicial review....").

A recent example of this "hard look review" in action appears in *Ecology Center, Inc. v. U.S. Forest Service*, 451 F.3d 1183 (10th Cir. 2006). The plaintiffs asked for declaratory and injunctive relief to stop the U.S. Forest Service from approving a "Resources Management Project" that would allow logging on public land, because they claimed that the logging activity would adversely affect the endangered northern goshawk. The relevant regulations required the Forest Service to consider the "best available science" when implementing site-specific projects. The Forest Service approval of the plan specifically discussed a leading scientific report about the potential effects on the northern goshawk's habitat, and asserted that the proposed logging project would actually improve habitat conditions. The court, however, was unconvinced. The Forest Service used the scientific report selectively, and when the agency's "conclusions differ with the report's 'best available science' it simply argues that we must defer to its expertise." The court reversed this inadequately explained agency decision as arbitrary and capricious. The Sentencing Commission's amendments to the guidelines deserve no greater judicial deference.

The provisions of section 3553(a), combined with familiar concepts of administrative review, give federal courts the necessary tools to grant proper deference to the Sentencing Commission. Any deference requires that the Commission apply its expertise to assemble relevant facts and to explain how its policy choices flow from the available facts. The courts can carry out this review function in particular cases by testing applicable guidelines and any suggested sentence and sentencing range against the requirement of a parsimonious sentence, § 3553(a), the offense and offender charac-

teristics of each case, § 3553(a)(1), the kinds of sentences available, § 3553(a)(3), the need to provide restitution to victims, § 3553(a)(7), and the two sets of broader aims—the need to avoid unwarranted sentence disparities in similar cases, § 3553(a)(6), and the need for each sentence to be considered in light of the statutory purposes of sentencing in § 3553(a)(2).

CONCLUSION

Both the substantive and remedial opinions in *Booker* are wholly consistent with the original vision of Congress in the SRA. The task for sentencing judges under the SRA was to be both easier and harder than what came before. Judges were required to explain reasoning previously left behind the veil of discretion. Fortunately, sentencing judges can be assisted in the case-specific assessments by probation officers, and after the implementation of the SRA they have the guidelines, case law, and the arguments of counsel to help produce a just, fair and reasonably consistent system. Both the SRA and *Booker* are consistent with the larger modern sentencing reform movement. Robert Weisberg & Marc Miller, *Sentencing Lessons*, 58 Stan. L. Rev. 1 (2005).

Lower federal courts have had trouble finding their proper role, both before and since *Booker*. Attention to the text of the SRA, the goals of modern sentencing reform, and the scope of reasonableness review after *Booker* should lead this Court to reject presumptive weight for sentences within the applicable guidelines. The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARC L. MILLER
Counsel of Record
University of Arizona
James E. Rogers College
of Law

MICHAEL O'HEAR
Marquette University Law
School

KATE STITH
Yale Law School

RONALD F. WRIGHT
Wake Forest University
School of Law

ROBERT B. FISKE
Davis, Polk & Wardwell
New York, New York

JAMES G. RICHMOND
Greenberg Traurig
Chicago, Illinois

EARL J. SILBERT
DLA Piper
Washington, DC

PETER VAIRA
Vaira & Riley
Philadelphia, Pennsylvania

Counsel for Amicus Curiae

December 18, 2006